

AUG 23 1978

MICHAEL ROBAK, JR., CLERK

IN THE

**Supreme Court of the United States**

JULY TERM, 1978

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No. 78-122

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MICHAEL SHULER,  
*Petitioner,*

v.

STATE OF INDIANA,  
*Respondent.*

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**BRIEF IN OPPOSITION TO PETITION  
FOR WRIT OF CERTIORARI**

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### QUESTIONS PRESENTED

1. Whether Petitioner's Sixth Amendment rights were violated by ineffective assistance of counsel at trial.
2. Whether the sentencing procedure at trial violated Petitioner's due process rights.

### STATEMENT OF THE CASE

On December 3, 1973, Frederick Alter and Virgil Cheseldine were driving on an interstate highway in Indianapolis, Indiana. The Petitioner approached the victim's car

from behind at a high speed, tailgated it for a time and then cut abruptly in front of the victim's car. Alter motioned for the Petitioner to pull over. After both cars stopped, the drivers got out. The Petitioner had a gun in his hand and shot Alter as he approached.

The Petitioner was charged with Assault and Battery with Intent to Kill. He was convicted by a jury of Assault and Battery. The Indiana Court of Appeals affirmed the verdict unanimously and the Indiana Supreme Court denied Petitioner's Petition to Transfer. This Petition for Writ of Certiorari follows.

## ARGUMENT

### I.

In Indiana there is a strong presumption that trial counsel was competent. What the attorney did or did not do at trial must have made the proceedings a "mockery of justice shocking to the conscience of the reviewing Court." *Dull v. State*, (1978) — Ind. —, 372 N.E.2d 171; *Kerns v. State*, (1976) — Ind. —, 349 N.E.2d 701. Indiana's standard is very similar to the Seventh Circuit's "sham or mockery" standard. *U.S. ex rel. Williams v. Twomey*, (7th Cir., 1975) 510 F.2d 634.

The Petitioner argues that he was denied effective assistance of counsel in that his trial attorney did not object to the admission into evidence of his statement to police or evidence lawfully seized by police at the time of Petitioner's arrest. At trial the police officer to whom Petitioner made his statement testified that he gave Petitioner the *Miranda* Warnings and that Petitioner understood them. Thus, an objection by Petitioner's counsel would have been futile here anyway. As for the evidence seized by police at the time of Petitioner's arrest, Petitioner fails to demonstrate how such seizure was unlawful. The

facts do not indicate any illegality. Petitioner has failed therefore to overcome the strong presumption that his trial counsel was competent.

### II.

After Petitioner was found guilty of Assault and Battery, sentencing was held before James A. Neel, Special Judge. Judge Neel offered the Petitioner a choice of sentences: either six months at the State Farm, or ten weeks in jail and a year's probation. The conditions of probation stipulated that the Petitioner not carry a gun for a year. From the record it is somewhat unclear if the Petitioner completely understood the terms of the probation, but he elected to take the jury's determination of six months at the State Farm.

Petitioner attempts to characterize the Special Judge's offer of probation as a denial of the right of appeal by claiming that the offer implies that the Petitioner could not appeal his conviction if he chose the reduced offer. This is a strained interpretation of the Special Judge's offer. It appears from the record that the Petitioner took the six months at the State Farm because he felt that to accept the probation would amount, in his own mind, to a confession of guilt.

In Indiana trial courts have the discretion to grant or deny a suspended sentence or probation. *Grzesiowski v. State*, (1976) — Ind. App. —, 343 N.E.2d 305. In the case at bar the Special Judge set the conditions of probation but the waiver of right of appeal was not one of them. Petitioner did appeal his conviction. If the State of Indiana had attempted to impose such a condition then Petitioner's attempt to bring his case under the mantle of *North Carolina v. Pearce*, 395 U.S. 711, 89 S.Ct. 2072, 23 L.Ed2d 707, (1969), might be persuasive. However, Petitioner cannot demonstrate the denial of a fundamental right.

**CONCLUSION**

**WHEREFORE,** Respondent respectfully urges that the  
Petition for Writ of Certiorari be denied.

Respectfully submitted,

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